

No. 12628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUNBEAM FURNITURE CORP., ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, doing business as
SUNBEAM FURNITURE SALES CO.,

Appellant,

vs.

SUNBEAM CORPORATION,

Appellee.

APPEAL BY THE DEFENDANTS FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF CALIFORNIA, CENTRAL DIVISION, IN A
TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION
ACTION.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

The Appellants will hereinafter be referred to in their joint capacity as Defendant and Appellee as Plaintiff.

Jurisdiction.

Final judgment was entered on the 3rd day of April, 1950 [R. 75] and Notice of Appeal was filed on the 3rd day of May, 1950 [R. 75, 76]. Provisions of 28 U. S. C. A. 1338 confer original jurisdiction upon the District Court and jurisdiction upon this court to review the judgment appealed from is conferred by 28 U. S. C. A. 1291. No question of jurisdiction or pleading is raised by this appeal.

Statement of the Case.

Plaintiff's first complaint named as Defendants Sunbeam Furniture Corporation *et al.*, a California corporation, and Expert Lamps, Inc., a corporation of Illinois. On February 4, 1949, an order was granted quashing service of process on Expert Lamps, Inc., because it was outside the jurisdiction of the court. On February 4, 1949, an amended complaint was filed omitting Expert Lamps, Inc. as Defendant. Plaintiff sets up trademark registrations of the trademark SUNBEAM for sundry electrical appliances [R. 31-32] and charges Defendant with trademark infringement by sale of a decorative lamp bearing a tag with the name "Expert Lamps, Inc." and Expert's trademark SUNBEAM imprinted thereon, and with unfair competition by use of the name "Sunbeam Furniture Corp." in a strictly furniture business which includes the sale of decorative electric lamps. It is not clear which of Plaintiff's trademarks is relied on as being infringed.

Defendant in answer denies that sale of electric lamps constitutes sale of Plaintiff's electrical goods, denies trademark infringement by use of the mark on any goods, and denies unfair competition by employment of the name "Sunbeam Furniture Corp." in its furniture business [R. 39, 40].

Defendant has not contested validity of Plaintiff's trademark but has challenged Plaintiff's right to extend claim to the mark beyond the specific goods covered by the trademark registrations identified in the complaint.

The trial court enjoined Defendant from continuing to use the name SUNBEAM in connection with its furniture business or upon any of the products from whatever source which it sells and from doing anything calculated to induce

belief that Defendant is any way connected with Plaintiff or its goods. Damages were waived by Plaintiff.

Since judgment was entered by the trial court in this case the appeal in a companion case, *Sunbeam Lighting Co. et al. v. Sunbeam Corporation*, Appeal No. 12357 in this Circuit, F. 2d, 86 U. S. P. Q. 240, was decided and in the opinion filed June 30, 1950, the scope of Plaintiff's trademark SUNBEAM was defined as limited to its own specific field. In that field Plaintiff's trademark was held to be valid.

Because of that decision the Defendant in this case does not challenge the validity of Plaintiff's trademark but does rely upon the limited scope of the trademark as defined by the Court of Appeals.

Evidence.

Plaintiff claims ownership in a great many trademarks all directed to electric appliances such as mixers, flat-irons, coffee-makers, toasters and grills, to mention a few. Plaintiff merchandises a limited number of industrial items. All but very few appliances are motor driven. Appliances are sold on a basis of quality performance to individual consumers. Plaintiff contends its trademark to be applicable to a very extensive segment of the industry devoted to electrical goods without claiming or showing actual use by Plaintiff of the trademark on articles other than electric appliances. Plaintiff's case against Defendant here is based upon the contention that decorative table lamps are within the scope of Plaintiff's trademark protection regardless of how or to whom they may be sold.

Defendant is engaged in the business of buying a great variety of household furniture, warehousing it for the con-

venience of retail dealers in southern California and selling it at wholesale. Among the multitude of items of household furniture handled is a small percentage of decorative lamps, comprising bases and lamp shades. Merchandise is shipped to Defendant from the manufacturers in crates and cartons in which Defendant re-ships the contents to its customers without opening. Single samples of the various items are displayed to Defendant's customers at three restricted show-rooms from which the general public is expressly excluded.

Defendant uses no tradename or trademark of any kind but employs only price tags and shipping labels upon which appears the full name of the Defendant, "Sunbeam Furniture Corp."

One of Defendant's many suppliers is Expert Lamps, Inc., an Illinois corporation which employs the trademark SUNBEAM on decorative lamps. Some of these are handled by Defendant in the same fashion as all of Defendant's other merchandise.

Defendant has a substantial business and good will in its own special field.

Questions Involved.

The real issues in this case are whether or not Defendant by employment of the name "Sunbeam Furniture Corp." in a business limited entirely to the wholesaling of furniture competes unfairly with Plaintiff because of Plaintiff's ownership in the trademark SUNBEAM for electrical appliances, and whether or not Defendants, by re-selling decorative lamps, only some of which carry the trademark Sunbeam of Expert Lamps, Inc., infringe Plaintiff's trademark. In all cases and on all products the full name of the Defendant or his supplier, or both, boldly appear.

Specification of Errors Relied Upon.

The trial court has committed reversible error in each of the following respects:

1. In finding that Plaintiff uses its trademarks on lamps in general and other similar products [Finding 15, R. 66; Points on Appeal 2].

2. In finding that Defendant sold electric appliances bearing the trademark SUNBEAM [Finding 19, R. 68; Points on Appeal 3].

3. In finding in effect that all electric lamps sold by Defendant were manufactured by Expert Lamps, Inc. [Finding 21, R. 68; Statement of Points 5].

4. In finding that Defendants have no good will in the word SUNBEAM [Finding 23, R. 69; Statement of Points 7].

5. In failing to find that use of the trademark SUNBEAM by Expert Lamps, Inc. has been contemporaneous with use of the trademark SUNBEAM by Plaintiff for twenty to twenty-five years [Statement of Points 9].

6. In finding that Defendant's decorative lamp bases and shades are of a character likely to result in confusion with Plaintiff's electrical appliances [Finding 30, R. 70; Statement of Points 13].

7. In finding that there was actual confusion between products of Defendants and products of Plaintiff [Finding 31, R. 70; Statement of Points 14].

8. In finding that use of SUNBEAM by Defendant is likely to and does result in confusion [Finding 38, R. 71; Statement of Points 20].

9. In finding that the word SUNBEAM indicates to the trade and to the public Plaintiff and Plaintiff's goods, without qualification [Finding 41, R. 71; Statement of Points 20].

10. In concluding that use by Defendant of "Sunbeam Furniture Corp." or "Sunbeam Furniture Sales Corp." as a name or business style constitutes unfair competition [Conclusion 5, R. 72; Statement of Points 22].

11. In concluding that Defendant's sale of products bearing the trademark SUNBEAM infringes Plaintiff's trademark SUNBEAM [Conclusions 4, 6, R. 72; Statement of Points 23].

12. In concluding that use by Defendant of SUNBEAM will inevitably be likely to create confusion [Conclusion 8, R. 72; Statement of Points 24].

13. In failing to give proper weight and credence to Defendant's testimony [Statement of Points 28].

14. In failing to find that electrical appliances manufactured by Plaintiff are completely unrelated to general household furniture sold by Defendant [Statement of Points 30].

15. In failing to find that the class of customers who buy Plaintiff's goods at retail is entirely different from the discriminating customers who purchase Defendant's products at wholesale [Statement of Points 31].

16. In failing to find and distinguish between the fact that Plaintiff's goods are sold and offered for sale to the general public, whereas Defendant's goods can only be seen

in three restricted show-rooms by special arrangement [Statement of Points 32].

17. In failing to hold that Defendant employs no trademark whatsoever on the goods or packages at any time [Statement of Points 33].

18. In failing to distinguish between the corporate entities of Defendant, Sunbeam Furniture Corp., a California Corporation, and Expert Lamps, Inc., a corporation of Illinois [Statement of Points 36].

19. In failing to weigh the fact that 99% of Defendant's furniture business does not carry the trademark SUNBEAM in any guise and that only 1% of Defendant's furniture business consists of sale of lamps and shades carrying trademark of Expert Lamps, Inc., namely, SUNBEAM applied thereto [Statement of Points 37].

20. In according to a non-fanciful trademark the same degree of monopoly normally accorded a fanciful mark [Statement of Points 39].

21. In holding that Plaintiff established actual and probable confusion among buyers of Defendant's goods as to the origin of Defendant's goods [Statement of Points 42].

22. In holding that Defendant adopted the name SUNBEAM to capitalize upon Plaintiff's reputation [Statement of Points 44].

23. In enjoining Defendant from using or continuing to use SUNBEAM as part of its name in its furniture business or upon any products which it sells.

Summary of Argument.

POINT 1. SUNBEAM is a non-fanciful mark, being a word in common usage; as such it should be given but a limited scope.

- (a) Prior use of SUNBEAM.
- (b) "SUN" plus various suffixes has enjoyed a widespread use on a great diversity of products.
- (c) SUNBEAM in its ordinary sense is descriptive.

POINT 2. Character of the goods manufactured and sold by Plaintiff under the trademark defines its scope.

- (a) Plaintiff is consistent in marketing a line of electric appliances.
- (b) Appliances do not mean household furniture.
- (c) Plaintiff is not entitled to preempt trademark rights outside its own field.
- (d) Plaintiff's employment of mark on specific goods only is an admission of the limited scope of the mark.

POINT 3. Defendant does business only in its own field and that field is not the Plaintiff's.

- (a) Plaintiff's goods and Defendant's goods are different and entirely unrelated.
- (b) Lamps and lamp-shades as sold by Defendant are accessory only to its household furniture business.
- (c) Suppliers of Defendant's merchandise employ their own special marks, which they, the suppliers, apply to the goods—Some have no trademark.
- (d) The manner of sale and type of customers supplied by Defendant are different from those of Plaintiff.

(e) Defendant advertises only to the wholesale field.

POINT 4. There is no actual confusion.

- (a) Plaintiff's witnesses found no confusion.
- (b) Instances of purported actual confusion are questionable.
- (c) Defendant's witnesses saw no evidence of confusion.
- (d) Plaintiff's surveys were in a field never entered by Defendant.

POINT 5. There is no likelihood of confusion.

- (a) Unrelated goods are not likely to be confused.
- (b) Display and sale of Defendant's goods only in restricted show-rooms establishes no likelihood of confusion.
- (c) Defendant employs no tradename on its goods. Price tags are removed before shipment.

POINT 6. There is no trademark infringement.

POINT 7. There is no unfair competition.

- (a) No competition in fact exists and this should be considered.
- (b) Good will attaching to Plaintiff's products is of no value to Defendant who sells only a special service.
- (c) Defendant's customers and trade are never confused as to origin of Defendant's goods.

THE ARGUMENT CONDENSED.

POINT 8. The Trial Court's findings have no basis in fact, and its conclusions are erroneous.

POINT 9. The judgment exceeds the proof and is in error.

ARGUMENT.

POINT 1. SUNBEAM Is a Non-fanciful Mark, Being a Word in Common Usage; as Such It Should Be Given but a Limited Scope.

(a) Prior Use of SUNBEAM.

This Court of Appeals has already passed upon the scope and validity of the trademark SUNBEAM as used by the Plaintiff herein in the previously decided case of *Sunbeam Lighting Co. v. Sunbeam Corporation*, Appeal No. 12357 (*supra*). In that case this court had before it sufficient evidence of diverse prior use of the trademark SUNBEAM to justify its holding that its meaning has “spurred the innumerable usages of the word as a short, terse, recognizable, rememberable insignia.”

Expert Lamps, Inc. has made use of SUNBEAM on lamps contemporaneously with Plaintiff’s use of SUNBEAM on appliances for the past twenty or twenty-five years [R. 255].

(b) “SUN” Plus Various Suffixes Has Enjoyed a Widespread Use on a Great Diversity of Products.

Use of the trademark SUNBEAM, SUN, or SUN-plus a common suffix has occurred almost numberless times throughout the United States. Plaintiff attached no significance to those other uses. The attention of plaintiff’s President Graham was called to fifty-one instances of use of SUNBEAM on divers businesses when he was asked if these divers uses had been searched and investigated prior to change of plaintiff’s name from Chicago Flexible Shaft

Co. to Sunbeam Corporation. The same witness's attention was directed to thirty-eight uses of SUN or SUN-plus a common suffix such as SUNBEAM, SUNRISE, SUNRAY, etc., on divers businesses [R. 159-166 and Ex. B].

This Court of Appeals reviewing the materiality of such widespread use has made the following language of record in its decision:

"The trial court's conclusion goes to the extent that, because the plaintiff has a registered and common law trademark of the word 'Sunbeam' and use thereof in relation to its actual produce and because of its extensive business, that word is plaintiff's sole property in commerce in the whole broad electrical field. This conclusion extends the restriction on the use of a non-fanciful word far beyond any instance that we are aware of. We are unwilling to affirm the holding that the possibility or the actual proof of an occasional instance of a person's surmise that defendants' print of 'Made by Sunbeam Electrical Appliance Co., Los Angeles, California' or similar wording in a catalog or on an electrical fluorescent fixture suggests plaintiff as the manufacturer, and is enough to support the injunction. The law goes to no such extreme."

"The differentiation of strong and weak marks is well discussed and defined in *American Steel Foundries v. Robertson*, 269 U. S. 372 (1926); *Majestic Mfg. Co. v. Majestic Elect. App. Co. Inc.*, 6 Cir., 172 F. 2d 862 (1949); *Dwinell-Wright Co. v. Nat. Fruit Co.*, 1 Cir., 140 F. 2d 618 (1944); and *Arrow Distilleries v. Globe Brewing Co.*, 4 Cir., 117 F. 2d 347 (1941), all in appellant's opening brief."

"The word 'Sunbeam' is not a fanciful term with little use in the English-speaking world."

Sunbeam Lighting Co. v. Sunbeam Corp., F. 2d, 86 U. S. P. Q. 240, 243.

Use of a non-fanciful mark in a closely related field will not be enjoined unless use would indicate a common origin.

If businesses are non-competitive the apprehension of confusion is less.

American Automobile Insurance Company v. American Auto Club, 87 U. S. P. Q. 59 (C. C. A. 9).

This court is well supported by other authorities.

A later user of "White House" for vegetable juices was held to prevail over a prior user of "White House" for coffee and tea when the prior user attempted to use "White House" on fruit juices.

Dwinell-Wright Co. v. National Fruit Product Co., 140 F. 2d 618 (C. C. A. 1).

The trademark "Majestic" was held non-fanciful and therefore not to warrant preventing a manufacturer of electric irons and toasters from using the mark in view of a prior use of "Majestic" on gas stoves and electric plates.

Majestic Mfg. Co. v. Majestic Electric Appliance Co., Inc., 172 F. 2d 862 (C. C. A. 6).

"Gold Medal" though widely used for flour was held distinctly not original or fanciful and not infringed by "Gold Medal" when used on a pancake flour mix.

France Milling Co. v. Washburn-Crosby Co., 7 F. 2d 304 (C. C. A. 2).

"Arrow" was held a word of such common usage that it could be used without confusion by one manufacturer for beer and by another manufacturer for cordials.

Arrow Distilleries v. Globe Brewing Co., 117 F. 2d 347 (C. C. A. 4).

(c) Sunbeam in Its Ordinary Meaning Is Descriptive.

The trial judge in examining defendant's price tag was impressed by the tag on the lamp of one of defendant's suppliers evidencing "a sundial, a big circular sign with a fancy L running through it. You have a circle there about three inches" [R. 360].

In California where sunshine is so widely publicized SUN plus some suffix or other is a commonly used descriptive term. The Sunset Home Furniture Company is located on the prominent Sunset Boulevard in Los Angeles [R. 325]. Sunkist is a tradename of wide publicity referring to California fruit. Defendant in selecting SUN-BEAM envisioned SUNBEAM signifying the ray of a sun and being in California and finding no one else using the name SUNBEAM in the furniture business considered it appropriate for a California business [R. 251].

Plaintiff's untenable position is revealed where it takes the stand that SUN-plus any suffix for any electrical goods is an infringement [R. 120, 121, 127].

The word "Simplex" because it had been registered about sixty times by as many different parties on different kinds of merchandise was held strictly non-fanciful and in the same class as "Star" and "Sunlight".

American Steel Foundries v. Robertson, 269 U. S. 732, 70 L. Ed. 317.

The relative scope of strong and weak marks is discussed at length by the able judge in *Pease v. Scott County Milling Co.*, 5 F. 2d 524, 525, D. C. E. D. Mo., 1925. It will be apparent that the decision of this Ninth Circuit is in accord with the other circuits in holding that a mark like SUNBEAM is obviously a weak mark and not entitled to protection beyond its immediate field.

POINT 2. Character of the Goods Manufactured and Sold by Plaintiff Under the Trademark Defines Its Scope.

(a) Plaintiff Is Consistent in Marketing a Line of Electric Appliances.

Plaintiff's many trademark registrations emphasize *electric appliances such as flat irons, heating pads, toasters, portable heaters, percolators, pipe lighters, food mixers, clocks, fans, juicers, dry shavers, clippers and hedge trimmers, to mention a few* [R. 5, 6]. All are electrically operated. Almost all need a motor. *No lamps for general illumination are included.* No household furniture is included. Only cabinets, receptacles and display stands for Plaintiff's kitchen appliances are mentioned in its list of trademarks.

Plaintiff's goods are limited to "traffic appliances" [R. 139, 140]. Various "traffic appliances" are defined by example [R. 142] wherein vast quantities sold are noted.

Plaintiff has never sold large appliance items such as electric ranges, ironing machines, and washing machines [R. 140]. Plaintiff has never sold crockery, framed pictures [R. 141], table lamps with or without shades, lamp shades, floor lamps [R. 143], smoker's tables [R. 144], divans, easy chairs, cocktail tables, hassocks [R. 145], occasional chairs, bedsteads, cedar chests, mattresses, desks [R. 146].

Plaintiff's stock in trade is a high quality appliance and is sold on performance [R. 179].

(b) Appliances Do Not Mean Household Furniture.

Plaintiff has attempted to define household furniture relying upon the dictionary definition as anything and everything movable which goes into a home. Plaintiff's practice, and general practice also, treats appliances as specific well-defined merchandise not in the category of furniture. Plaintiff's counsel recognizes the distinction in questioning the witness Strandstra where he asks first of the witness:

"Q. Do they handle lamps? A. Yes, they handle a large assortment of lamps.

Q. Decorative table lamps? A. I would assume that they would be classified, some of them, decorative, yes, sir * * *.

Q. Does that concern also handle appliances? A. Yes, they do." [R. 182, 183.]

Plaintiff's witness Strandstra also recognizes the difference when he answers:

"A. The lamp department is spread through the biggest portion of the store, with the exception I would say—everything is more or less broken up into different departments (73) such as the rug department, appliance department; *the lamps don't fit into that department, we don't use them there.*" [R. 185.] (Emphasis ours.)

"Q. All lamps in fact are confined to the furniture portion of the premises are they not? A. Well, in our store they are, yes, sir." [R. 186.]

The same witness identifies all Plaintiff's products known to him as traffic appliances [R. 186, 187]. Lamps are not appliances in the opinion of a furniture salesman [R. 194].

Electric appliances are treated as something separate from furniture in the Los Angeles Furniture Mart [R. 208]. Plaintiff's witness, Wilson, employed in her father's appliance shop defines their line of large appliances and small appliances. Small appliances mean to her: "Well, hand irons, toasters and waffle irons and mixers" [R. 314]. That store handles the complete Sunbeam line. When customers come in "*They will ask for a Sunbeam iron or toaster, waffle iron*" [R. 314]. (Emphasis added.)

Plaintiff's witness Brandenburg recognizes what the term means. When SUNBEAM is mentioned to her she recalls SUNBEAM appliances in her home and names them as "*a mixer and a coffee maker and an iron, and my husband has had two or three SUNBEAM razors*" [R. 329]. (Emphasis added.)

Plaintiff's witness Jesse Hampshire recognizes the trademark SUNBEAM to mean ". . . electrical products we have in our home, what I have, in particular. *I have a mixer and a waffle maker*" [R. 331]. (Emphasis added.)

Seven others of Plaintiff's witnesses would make the same statement that what SUNBEAM means to them is electric appliances sold by Plaintiff [R. 333].

(c) Plaintiff Is Not Entitled to Preempt Trademark Rights Outside Its Own Field.

Plaintiff does not manufacture and sell light sockets and plugs for anything other than its electrical appliances [R. 121]. Plaintiff has never manufactured an extension cord. That is the only thing electrical which Defendant ever utilizes.

There is a great field of electrical products which Plaintiff does not touch. Plaintiff never makes or uses its mark

on street lights, search lights, flash lights, auto lamps, landing field lights, traffic lights, flood lights, radio lights, Christmas tree lights, neon signs, beacon lights, flash bulbs, photo flood lamps, miner's lamps. Plaintiff does not use its trademark on other electrical things such as relays, radios, elevators, machine tools, generators, street cars, outlet boxes, cable and wire, insulators, lightning rods, aerials, ammeters and voltmeters, transformers, batteries, thermostats [R. 126-127]. Plaintiff does not even make all types of electrical appliances. Apparently there is some limit to Plaintiff's claim of a right to use SUNBEAM on electrical goods.

Plaintiff clearly manufactures and sells goods which appeal to the retail trade. Plaintiff never buys and resells goods of another manufacturer under another's trademark [R. 168]. In this respect Plaintiff's business differs considerably from defendant's business with respect to items manufactured and sold as well as to manner of sale.

**(d) Plaintiff's Employment of Mark on Specific Goods Only
Is an Admission of the Limited Scope of the Mark.**

When Plaintiff recently incorporated under the new name, Sunbeam Corporation, it did not investigate a host of other users, having made no search [R. 123, 124, 158]. obviously it was of no concern to Plaintiff that SUNBEAM may have been used in fields other than its own when it chose its corporate name.

No furniture dealer in Los Angeles handles Plaintiff's products, namely, Plaintiff's electrical appliances [R. 130]. Though display stands are not appliances they are not sold [R. 152].

Electric appliances are treated as something separate from furniture in the Los Angeles Furniture Mart [R. 208]. Plaintiff's witness, Wilson, employed in her father's appliance shop defines their line of large appliances and small appliances. Small appliances mean to her: "Well, hand irons, toasters and waffle irons and mixers" [R. 314]. That store handles the complete Sunbeam line. When customers come in "*They will ask for a Sunbeam iron or toaster, waffle iron*" [R. 314]. (Emphasis added.)

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on street lights, search lights, flash lights, auto lamps, landing field lights, traffic lights, flood lights, radio lights, Christmas tree lights, neon signs, beacon lights, flash bulbs, photo flood lamps, miner's lamps. Plaintiff does not use its trademark on other electrical things such as relays, radios, elevators, machine tools, generators, street cars, outlet boxes, cable and wire, insulators, lightning rods, aerials, ammeters and voltmeters, transformers, batteries, thermostats [R. 126-127]. Plaintiff does not even make all types of electrical appliances. Apparently there is some limit to Plaintiff's claim of a right to use SUNBEAM on electrical goods.

Plaintiff clearly manufactures and sells goods which appeal to the retail trade. Plaintiff never buys and resells goods of another manufacturer under another's trademark [R. 168]. In this respect Plaintiff's business differs considerably from defendant's business with respect to items manufactured and sold as well as to manner of sale.

**(d) Plaintiff's Employment of Mark on Specific Goods Only
Is an Admission of the Limited Scope of the Mark.**

When Plaintiff recently incorporated under the new name, Sunbeam Corporation, it did not investigate a host of other users, having made no search [R. 123, 124, 158]. obviously it was of no concern to Plaintiff that SUNBEAM may have been used in fields other than its own when it chose its corporate name.

No furniture dealer in Los Angeles handles Plaintiff's products, namely, Plaintiff's electrical appliances [R. 130]. Though display stands are not appliances they are not sold [R. 152].

Electric appliances are treated as something separate from furniture in the Los Angeles Furniture Mart [R. 208]. Plaintiff's witness, Wilson, employed in her father's appliance shop defines their line of large appliances and small appliances. Small appliances mean to her: "Well, hand irons, toasters and waffle irons and mixers" [R. 314]. That store handles the complete Sunbeam line. When customers come in "*They will ask for a Sunbeam iron or toaster, waffle iron*" [R. 314]. (Emphasis added.)

Plaintiff's witness Brandenburg recognizes what the term means. When SUNBEAM is mentioned to her she recalls SUNBEAM appliances in her home and names them as "*a mixer and a coffee maker and an iron, and my husband has had two or three SUNBEAM razors*" [R. 329]. (Emphasis added.)

Plaintiff's witness Jesse Hampshire recognizes the trademark SUNBEAM to mean ". . . electrical products we have in our home, what I have, in particular. *I have a mixer and a waffle maker*" [R. 331]. (Emphasis added.)

Seven others of Plaintiff's witnesses would make the same statement that what SUNBEAM means to them is electric appliances sold by Plaintiff [R. 333].

(c) Plaintiff Is Not Entitled to Preempt Trademark Rights Outside Its Own Field.

Plaintiff does not manufacture and sell light sockets and plugs for anything other than its electrical appliances [R. 121]. Plaintiff has never manufactured an extension cord. That is the only thing electrical which Defendant ever utilizes.

There is a great field of electrical products which Plaintiff does not touch. Plaintiff never makes or uses its mark

on street lights, search lights, flash lights, auto lamps, landing field lights, traffic lights, flood lights, radio lights, Christmas tree lights, neon signs, beacon lights, flash bulbs, photo flood lamps, miner's lamps. Plaintiff does not use its trademark on other electrical things such as relays, radios, elevators, machine tools, generators, street cars, outlet boxes, cable and wire, insulators, lightning rods, aerials, ammeters and voltmeters, transformers, batteries, thermostats [R. 126-127]. Plaintiff does not even make all types of electrical appliances. Apparently there is some limit to Plaintiff's claim of a right to use SUNBEAM on electrical goods.

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No furniture dealer in Los Angeles handles Plaintiff's products, namely, Plaintiff's electrical appliances [R. 130]. Though display stands are not appliances they are not sold [R. 152].

The name SUNBEAM signifies appliances.

“The Court: * * * when they asked for SUNBEAM what do you understand them to ask for?”

The Witness: Well, I know that they want a SUNBEAM appliance.” [R. 181.]

In considering the trademark the witness Strandstra said “Well, SUNBEAM, as far as I know, there is only one SUNBEAM, like SUNBEAM toasters, mixmasters, razors.” The name means the company that manufactures mixmasters and that sort of thing [R. 183].

To plaintiff’s witness Algier SUNBEAM means toasters and shavers [R. 375].

To Plaintiff’s witness Jackie Still SUNBEAM means “Mixmaster and Coffeemaster, toaster” [R. 395].

To none of the host of Plaintiff’s witnesses who gave testimony does SUNBEAM mean a lamp.

The Plaintiff has made its name SUNBEAM prominent in the electrical appliance field. In that field it may exclude infringers but the right does not extend beyond that field.

Before a trademark can be granted under the applicable Lanham Act, the application therefor must name the product to which it is to apply. 15 USCA Sec. 1051.

Also registration defines the right in a particular field. In doing so they merely carry forward the common law right which also limits the trademark to its own field.

“The trademarks should be confined substantially to the articles for which they were authorized, otherwise, why limit the mark at all?”

California Fruit Growers Exchange v. Sunkist Baking Co., 166 F. 2d 971, 974 (C. C. A. 7).

As held, therefor, the registration of "Sunkist" on edible fruits did not entitle Plaintiff to enjoin another from using "Sunkist" for edible bread.

"The right to the exclusive use of a trademark or tradename is limited to the territory or market wherein it has become established by use in such territory."

Griesedieck Western Brewery Co. v. People Brewing Co., 149 F. 2d 1019, 1022 (C. C. A. 8).

Where one by the name of Lerner in his own territory established a merchandising business and made known his identity with certainty, he was not infringer of the trade name "Lerner Shops" established elsewhere.

"* * * it is the duty of a person with the same or similar name, subsequently engaging in the same or similar business or dealing in like goods, *to take such affirmative steps as may be necessary to prevent his goods or business from becoming confused with the goods or business of the established trader.*' (Emphasis supplied.) 59 F. 2d at page 15. In this case such steps were taken."

Lerner Stores Corporation v. Lerner, 162 F. 2d 160, 164 (C. C. A. 9).

Titles of magazines having a similar connotation have been held not confusing where the facts indicated that there was no real confusion.

"Each case must be determined in the light of its particular facts."

"*'A publisher though he has a registered trademark cannot be protected from all of the inadequacies of human thought and memory.'*" (Emphasis added.)

Palmer v. Gulf Pub. Co., 79 Fed. Supp. 731, 737, 738 (U. S. D. C. S. D. Calif., 1948).

POINT 3. Defendant Does Business Only in Its Own Field and That Field Is Not the Plaintiff's.

(a) Plaintiff's Goods and Defendant's Goods Are Different and Entirely Unrelated.

Defendant sells no appliances whatsoever [R. 194]. Products made by plaintiff would not be classified as household furnishings or home furnishings [R. 195-196]. Lamps and table lamps are not classified as appliances but rather as home furnishings, furniture [R. 196]. Defendant sells about twenty different items of home furnishings or furniture and lamps are one of the twenty [R. 196]. In the Gladden Brothers Furniture store, Wolf as a furniture salesman never went into the separate appliance section [R. 193].

Defendant's line of merchandise features primarily such things as bedroom sets, dining room sets, chrome furniture, chairs, lamp tables and lamps, occasional tables [R. 216], crockery, hassocks, occasional furniture [R. 217].

ELEMENTS WHICH CONTROL SELECTION OF HOME FURNISHINGS.

“Q. In the sale of living room furniture, for example, what elements control the selection of one piece as against another? A. Well, style, color, size and just whether it fits in or not, in the home. Personal taste is the deciding factor. * * *

Q. In the sale of lamps in your experience with the Sunbeam Furniture Corporation, what elements control the selection of decorative lamps? A. Well, the same situation exists. I mean you have to [191] have the style of the lamp to fit in, and personal taste, and color. Well, those are the deciding factors just whether you like it or not.” [R. 191, 192.]

The particular manufacturer of any lamp has nothing to do with the selection.

In furniture stores an almost uncounted variety of lamps and of as many different manufacturers are carried. The Wolfe and Frankel Company, employers of the witness Wolfe, carried fifty to sixty manufacturers' lamps. Gladden Brothers carried lamps of about 100 manufacturers. They were in every conceivable pattern and variety [R. 193]. Clearly the great variety is to meet the great variety of taste and to have those items conform with a comparable variety of furniture.

Lamps and shades are sold together and are part of the same decorative pattern [R. 193]. Defendant always sells the shade and base together [R. 249].

(b) Lamps and Lamp-shades as Sold by Defendant Are Accessory Only to Its Household Furniture Business.

Plaintiff's witness, Garriott, recognizes that lamps are sold in accordance with design, and that source of manufacture is of no consequence [R. 176, 177]. One dealer in a sales talk on lamps to plaintiff's witness emphasized that he was selling ceramic ware and that the value lay in that [R. 326]. In comparing lamps to clothing the witness Wolfe remarked that the purchase of a lamp is a matter of personal taste [R. 198]. When the witness Wolfe was employed by the Gladden Brothers Furniture Company he was just in the furniture end of it and there sold bedroom, living room and dining room furniture, tables, lamps, rugs, carpets [R. 190]. Decorative lamps are items which complete a line of home furnishings. It would be a definite hindrance in the home furnishings business not to handle floor and table lamps conforming to the particular furniture handled [R. 229].

If a furniture dealer were prohibited from carrying decorative lamps to match his line it would definitely affect the sale of the furniture [R. 231].

Of defendant's whole line of household furniture lamps represent only 2% and lamps manufactured by Expert Lamps, Inc., carrying Expert's trademark SUNBEAM, comprise but 1% [R. 226]. All the lamps are decorative in character [R. 221].

Plaintiff's witness Enfield saw no more than about five lamps of the same style among the hundreds in the Broadway Department Store lamp department [R. 349].

(c) Suppliers of Defendant's Merchandise Employ Their Own Special Marks, Which They, the Suppliers, Apply to the Goods. Some Have No Trademark.

Trademarks are not important to buyers of lamps. Customers seldom ask for a special brand of lamp [R. 197]. They are not concerned with the manufacturer's identity [R. 196]. Lamp buyers are not trademark conscious as evidenced by the attitude of plaintiff's witness Sahl [R. 392]. *Defendant's witness Ives never looks at trademarks when she buys a lamp but is concerned only with style* [R. 371]. Plaintiff's witness Jackie Still is unaware of the trademark on the lamps in her own home [R. 395].

Defendant in its business of wholesaling furniture finds that many suppliers use no trademark [R. 222].

Defendant in the three restricted showrooms where samples of suppliers products are displayed applies to the product only defendant's price tag bearing no trademark but which reads "Sunbeam Furniture Corp., 1337 So. Flower St." The tags are prominently displayed [R. 210]. The tags are used only on the showroom floor [R. 200].

Those tags are removed before the goods are shipped [R. 200]. The predominant practice in defendant's business is to ship the goods to the customer in the same crates or cartons as received from the supplier without ever unpacking or repacking. The manufacturer's cartons are used. Only a label having on it "Sunbeam Furniture Corp." and defendant's address is added to provide a place for the customer's name and shipping address [R. 201]. Some lamps sold by defendant carry the trademark of Art Lighting Co. [R. 245, Exhibit BB].

(d) The Manner of Sale and Type of Customers Supplied by Defendant Are Different From Those of Plaintiff and Customers Are Discriminating Purchasers.

Defendant's business consists solely of sales to retail merchants. Defendant does not engage in a retail business. Defendant's customers are therefore limited to retail merchants who buy at wholesale. They know with a high degree of certainty with whom they do business. Defendant on its store front carries its full name Sunbeam Furniture Corp. [R. 214, Exhibit D]. No customer could be deceived by this. Defendant sells at wholesale only [R. 205].

Sunbeam Furniture Corp. buys as wholesalers and distributors furniture of all descriptions. It advises the customers the manufacturer of the goods [R. 285, 286]. The Sunbeam Furniture Corp. is purely and simply a jobber. The sales are to furniture dealers in California [R. 287]. When plaintiff's witness Wilson sought to buy an Expert Lamp from defendant, defendant's salesman Ain called personally at the Wilson store and made the sale. Wilson

bought as a retail dealer [R. 322]. Plaintiff's witness Enfield carried a card as a privileged purchaser to defendant's showroom when he made a purchase [R. 346]. He needed a card to be admitted.

Defendant's salesmen trade only with a particular clientele and the customers know precisely with whom they are dealing.

(e) Defendant Advertises Only to the Wholesale Field.

Plaintiff engages in no consumer advertising. It advertises only in one trade magazine "Furniture Field", which magazine is sold only on subscription [R. 211]. No electrical appliances are advertised by defendant in that magazine [R. 211, 212]. Such direct mail advertising as is engaged in is directed to retail dealers.

Defendant has no display or show window where any goods are displayed to the general public [R. 215]. Only bona fide dealers can gain entrance to the showroom or those having proper credentials [R. 215].

Plaintiff does not advertise in "Furniture Field" at any time [R. 156]. From numerous examples of plaintiff's advertising and the showing of its name on cards, packages and the like, it is obvious that plaintiff brings its name and trademark prominently and primarily before the consuming public which is a manner of advertising and publicity wholly unlike that practiced by defendant. While it may be true plaintiff distributes through wholesalers and distributors, its trademark is carried through to the consumer and it is a consumer business.

It is clear therefore that the defendant is engaging in its own business in its own way and following a practice completely foreign to plaintiff's business.

The Defendant in this case has a well-established business selling furniture at wholesale. It has built up a substantial good will in its business name Sunbeam Furniture Corp. It has a right in that field not to be molested by others like the plaintiff. This principle has substantial support in the law.

Use of "Par" for household laundry soap was held not to infringe a previously established use of "Par" for mechanics soap.

"* * * appellant had no right thereafter to extend its use of the name to interfere with granulated or bar soap of appellee's manufacture."

Treager v. Gordon-Allen, Limited, 71 F. 2d 766, 768 (C. C. A. 9).

Where the complaining party made no repair parts for ignition systems and alleged infringer did, complaining party had no right to interfere with the other business, although marks were almost the same.

"The mere fact that one person has adopted and used a trademark on his goods does not prevent the adoption and use of the same or a similar trademark by others on articles of a different description."

Philco Corporation v. F. & B. Mfg. Co., 170 F. 2d 958, 961 (C. C. A. 7).

See also:

Gold Dust Corporation v. Hoffenberg, 87 F. 2d 451, 452 (C. C. A. 2).

POINT 4. There Is No Actual Confusion.

(a) Plaintiff's Witnesses Found No Confusion.

In the entire experience of Fred Wolfe as a salesman in the Sunbeam Furniture Corporation's showroom there was never one occasion where any customer evidenced confusion between Defendant's products and Plaintiff's products [R. 195].

Luster never had anyone ask for a lamp manufactured by the Sunbeam Corporation [R. 251].

Philip Ain during all of his time as salesman for the Sunbeam Furniture Corporation never had anyone raise the question of there being any connection between Sunbeam Furniture Corporation and the Plaintiff [R. 263].

No one ever attempted to purchase from Mr. Ain electrical appliances of any kind [R. 262, 263].

The purchase of a lamp was made for the Wilson Appliance Store from Mr. Ain. There was no question but that Mr. Ain represented no one other than the Defendant [R. 264-265].

No dealer has ever expressed the understanding to Mr. Ain that manufacturer of the Sunbeam lamp (Expert Lamps, Inc.) was the company that manufactures mix-masters and devices of that kind [R. 264-265].

(b) Instances of Purported Actual Confusion Are Questionable.

Plaintiff's witness, Garriott, was in the appliance business in Pasadena handling appliances and also some lamps. It was four and one-half years before anyone came into his store and asked for a SUNBEAM lamp. The witness's answer is as follows:

“* * * a customer came in our store and asked for a Sunbeam lamp, and I told her that I didn't know

they made a lamp, and she was very indignant and finally she asked me, 'Do you know all of the things that Sunbeam makes?' I named over everything that I knew of that they made, and she said 'Well, I saw one down in L. A.' and turned around walked out very indignant."

Rehearsal of the incident by the witness under cross-examination [R. 173] gives every indication that the purported inquiry by a single customer was an inquiry engineered for the sole purpose of manufacturing evidence. No other inquiry was ever made before or since [R. 175]. Witness made no effort to guide the customer to a source of Sunbeam lamps because "I hadn't heard of it before."

The only purchase of a Sunbeam lamp ever made for the Wilson Appliance Store was one purchase expressly requested by Conley of the Sunbeam Corporation [R. 316]. Witness Wilson knew the Sunbeam lamp was not Plaintiff's lamp [R. 319]. Witness Wilson had a copy of an "ad" with the name Expert Lamp Co. of Chicago on it, taken from a trade publication when Wilson asked Defendant's salesman for the particular lamp which was purchased [R. 264]. Plaintiff's witness, Gibson, in laying a trap to secure an expression of confusion failed to give convincing testimony of such confusion. She says:

"A. We talked with Mr. Lane, and in talking to him, I told him that I had a Sunbeam Mixmaster-Sunbeam mixer, rather, and was curious to know if it was the same company that made the lamps.

He said it was the same corporation, but a different division. They made all kinds of electrical appliances. I asked him 'Is it the same company that makes the Sunbeam mixers?' He said 'Yes.' " [R. 325.]

The same paid canvasser then visited Kay's Department Store. The only Sunbeam lamps there in evidence were with ceramic bases, carrying the Expert Lamp Co. tag [R. 325].

Witness Enfield saw a Sunbeam lamp at the Globe Furniture Company. He knew it was made by Expert Lamp Company—therefore, not the Plaintiff, and also not the Defendant in this case [R. 351].

(c) Defendant's Witnesses Saw No Evidence of Confusion.

Witness Wallick was in business selling appliances for 18 years and carried floor lamps at one time. In all of that time no one ever came into his store and asked for a Sunbeam lamp [R. 181]. Witness Strandstra, who was manager of the Traffic Appliance Dept., in a Pasadena store four and one-half years never had anyone ask to be sold a Sunbeam lamp [R. 186].

(d) Plaintiff's Surveys Were in a Field Never Entered by Defendant.

Plaintiff surveyed the wrong market. The surveys were door to door canvasses of housewives and of casual persons who were stopped on the street, ninety-five per cent of whom were women. None of the persons were ques-

tioned on premises where lamps are sold or under circumstances where such persons would be likely to purchase lamps. Bedroom sets are not sold on the street corner and neither are the lamps which go with them. Among all of the 1500 persons or more questioned, not one buyer for a retail store was questioned. The circumstances do not represent the market for Defendant's goods nor are persons questioned representative of Defendant's customers. Answers of the persons questioned under those circumstances could be no more than casual.

Questions asked of the persons surveyed appear on Exhibit 10. The questions were clearly keyed to indicate to the person questioned that there might be other products made by makers of a lamp. One question reads: "Do you know whether the company that makes this lamp makes any other product or products?" The only article demonstrated to persons questioned was a photograph. The photograph showed a lamp only and all environment was removed. The photograph was not in color but merely in black and white. There is no contention on anyone's part that persons in the market for a decorative lamp purchase the lamp by inspection of a black and white photograph. Ninety-five per cent of the persons questioned were women. No men having answered, the percentages by calculation are in error. Men purchase lamps also. *But no one buys them in the street.*

POINT 5. There Is No Likelihood of Confusion.

(a) Unrelated Goods Are Not Likely to Be Confused.

Lamps are furniture, and especially decorative lamps sold by Defendant. The thing which makes this article of furniture electric is a conventional cord and plug [R. 250]. A lamp is not sold on its electric performance. Neither is the socket, cord and plug. Such electric items are in such common usage that surely no one would expect them to be marketed exclusively by the Plaintiff. The Plaintiff in fact manufactures no such things.

Lamps are furniture and Plaintiff knew better than to attempt to show that anyone could be confused into thinking that the sellers of bedroom furniture under the name Sunbeam Furniture Corp. could conceivably be the Sunbeam Corporation makers of electric appliances. That decorative lamps are just as remote from Plaintiff's appliances is equally obvious.

On the date of Plaintiff's incorporation, Plaintiff knew of no use by Defendant of the term SUNBEAM for any goods whatever. Being in a different field that is natural [R. 158, 159]. Plaintiff's witness Strandstra knew that lamps were furniture [R. 186]. Plaintiff's witness Wilson in a complete appliance store had no lamps [R. 318, 321].

(b) Display and Sale of Defendant's Goods Only in Restricted Show-rooms Establishes No Likelihood of Confusion.

One of these show-rooms is in the Los Angeles Furniture Mart. Defendant occupies 700 square feet of an area of about 300,000 square feet devoted almost entirely to furniture. Purchaser to gain access must be a bona fide retail dealer and carry credentials in the form of an admittance card. Defendant also has a comparable dis-

play in the San Francisco Furniture Mart, where a similar practice of admission is prevalent [R. 216].

The only other place Defendant's products are on display is the Sunbeam Furniture Corp. Showroom, 1337 South Flower Street. At that location admission must also be by card. Mr. Enfield needed a card for admission [R. 120]. When he purchased the lamp the lamp was consigned to Vander Furniture Mart and not to Enfield. The show-room on Defendant's premises is located on the second floor and there is no window for display purposes [R. 215]. Where Defendant's products are offered for sale in this manner, no customer or purchaser of normal mentality could possibly be deceived.

(c) Defendant Employs No Tradename on Its Goods. Price Tags Are Removed Before Shipment.

The witness Wilson saw no tag of Sunbeam Furniture Corp. on the lamp purchased [R. 320-321]. The witness Wolfe does not consider SUNBEAM used in the guise Sunbeam Furniture Corp. a brand name [R. 202]. Defendant manufactures nothing, Defendant sells nothing under its own private brand and never sends out goods labeled with any trademark belonging to Defendant [R. 212]. The name SUNBEAM never appears alone but only in combination with the words "Furniture Corp." Defendant has no other kind of label [R. 213]. Canvasser Trotman was not aware of the company which made the lamp as being makers of any other products [R. 368]. Canvasser Ives never looked at the trademark on a lamp [R. 371].

Where origin of Defendant's goods clearly appears, there is no confusion even though marks are similar.

"Anyone deceived or confused by the Plaintiff's package into believing he was getting the defendant's

package would be careless to a degree that the law has no duty to protect.”

Quaker Oats Co. v. General Mills, 134 F. 2d 429, 432 (C. C. A. 7).

Actual confusion must be real and not compounded of scattered inadvertencies and mistakes.

Although the names may be the same, “Horlick” and “Horlick’s”, “the obligation resting upon defendant in using his name is not to insure that every purchaser will know that he is the maker, but to use every reasonable means to prevent confusion.”

Horlick’s Malted Milk Corp. v. Horlick, 143 F. 2d 32, 36 (C. C. A. 7).

The mere fact that a survey suggests the possibility of confusion is not conclusive. Where the survey fails to reach defendant’s customers it means nothing. It does not show those customers to be confused.

“When met in the market place, the product of the parties left no room for doubt as to their source or their nature. There was no confusion there. That is the place that counts. Purchases of merchandise are not made in a vacuum with Professor Quiz in charge.”

Quaker Oats Co. v. General Mills, *supra*, citing from page 433.

Surveys of the sort relied upon by the Defendant in this case at bar are entitled to little weight. The court in this circuit has so ruled saying:

“The evidence contains reports of pollers who exhibited a photograph of defendants’ portable fluorescent lamp which show that some persons jumped to the conclusion that because it had the word

‘Sunbeam Lighting Co., Los Angeles’ in sight that it was manufactured by plaintiff in Chicago.”

Sunbeam Lighting Co. v. Sunbeam Corp., supra,
citing from page 243, U. S. P. Q.

The court in the cited SUNBEAM case then called attention to the fact that other more reliable evidence was contrary. Where purchasers are discriminating there is less likelihood of confusion. Defendant’s customers are discriminating retail merchants.

“In this case the goods of the parties are substantially identical, but they are relatively expensive and undoubtedly their purchase would be made only after a careful comparative investigation of different apparatus for air conditioning systems. These facts, together with the dissimilarity of the marks, impel us to the conclusion that the marks are not confusingly similar.”

Syncromatic Air Conditioning Corporation v. Williams Oil-O-Matic Heating Corporation, 109 F. 2d 784, 785 (C. C. P. A., 1940).

“A new competitor is not held to the obligations of an insurer against all possible confusion. He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference. *Skinner Mfg. Co. v. General Foods Sales Co., Inc.*, D. C., 52 F. Supp. 432, 433, 450.”

Life Savers Corporation v. Curtiss Candy Co., 182 F. 2d 4, 8 (C. C. A. 7).

That the new competitor is not an insurer against all possible confusion is the doctrine adopted by this Court of Appeals.

Sunbeam Lighting Co. v. Sunbeam Corp., supra.

POINT 6. There Is No Trademark Infringement.

No proof has been offered of the sale of any product by Defendant bearing a trademark possessed either by Defendant or Plaintiff. No proof is offered of any sale by Defendant in interstate commerce of any product whatsoever. The fact that Defendant sells lamps supplied by Expert Lamps, Inc., carrying the trademark and tag of Expert Lamps, Inc., even though that tag may bear the name SUNBEAM is immaterial. There is no contributory infringement in trademark cases. Defendant therefore cannot be a trademark infringer inasmuch as it does not employ the trademark as a tradename in any guise whatsoever. Use of the name SUNBEAM as practiced by Defendant could not create confusion of origin because the name SUNBEAM is invariably used to denote only "Sunbeam Furniture Corp." and could mean nothing else. The trial court appears to have lost sight of the fact that Defendant's business is the furniture business.

Inasmuch as Defendant uses no tradename of any kind but only Sunbeam Furniture Corp., Plaintiff apparently relies upon the SUNBEAM tag of Expert Lamps, Inc., as the infringing mark. Expert Lamps is not a party here. Service against it was quashed.

Where the Defendant does not apply the mark it is not an infringer. In a case where Truscon Laboratories applied the word "Ironite" to a roofing material which was

subsequently sold by Defendant with that name left on it, the court held:

“It follows from these findings of fact that the defendant has not infringed the copyright of the Ironite Company.”

Ironite Co. v. Guarantee Water-Proofing Co., 52 F. 2d 288, 290 (D. C. W. D. Mo., 1931).

“One who buys another’s goods may use or sell them with the latter’s trademark on them. *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.*, 92 F. 774.”

B. V. D. Co. Inc., et al. v. Davega-City Radio, Inc., et al., 16 Fed. Supp. 659, 660, 32 U. S. P. Q. 69 (D. C. S. D. N. Y.).

The trademark “Yale” established for flashlights and batteries could not be extended to other things to claim infringement.

“Since the plaintiff has used the word upon nothing but flash-lights and batteries, and so far as appears does not mean to do more, the defendant needs no further protection.”

Yale Electric Corporation v. Robertson, 26 F. 2d 972, 974 (C. C. A. 2).

“The exclusive right to use the mark should be limited to use on the class of goods for which it was registered, as set forth in the statement filed, and to merchandise of substantially the same descriptive properties.”

Walgreen Drug Stores v. Obear-Nester Glass Co., 113 F. 2d 956, 960 (C. C. A. 8).

POINT 7. There Is No Unfair Competition.

(a) No Competition in Fact Exists and This Should be Considered.

Plaintiff is in the market manufacturing and selling electric appliances. Almost nothing other than electric appliances are sold. These are sold on a performance basis.

On the contrary, Defendant is in the business of selling nothing other than household furniture. It sells no appliances. Furniture is sold in one department and appliances in a separate department in stores where both are carried. They are not confused nor sold under the same circumstances. They are not sold by the same sales persons. Further than this Defendant's products are sold only to a restricted clientele, purchasers at wholesale. When the goods are sold at retail, Defendant's identity is completely obliterated. *Defendant's stock in trade is a wholesaler's service*, the maintenance of a warehouse of goods in California for the convenience of California retail merchants. Sale of merchandise in this fashion and especially furniture, could not conceivably compete unfairly with the retail sale of electrical appliances. If the Plaintiff were successful in this action he could turn to any business whatsoever using the name SUNBEAM and if there were but a single electric item of any nature could sue the business for unfair competition with reasonable prospect of success.

(b) Good Will Attaching to Plaintiff's Products Is of No Value to Defendant Who Sells Only a Special Service.

The good will of the Plaintiff, and good will is not challenged, is of no benefit to the Defendant in the kind of business Defendant transacts. Plaintiff's good will depends upon association of electrical appliances with the SUNBEAM name. Defendant's good will is attached to prompt and efficient service to retail merchants by having available for them a great variety of household furniture which they can purchase at wholesale when there is a demand. There is no confusion of origin or of goods. No customer of the Defendant would do business with Defendant unless he knew the Defendant's ability to supply the customer with furniture of the sort requested.

(c) Defendant's Customers and Trade Are Never Confused as to Origin of Defendant's Goods.

No customer of Defendant purchases appliances from Defendant. There could not conceivably be any confusion of origin if Defendant's customers go to the source or origin of the goods which they want and make certain that the source or origin is the Defendant and no one else. They buy only goods which they know, and from a source which they know. None are deceived into believing that Defendant has any identity with Plaintiff.

It has been established that the law of trademarks is no more than a part of the law of unfair competition. The law of unfair competition is bottomed on the conception of the defendant trading upon the good will of the Plaintiff.

It is not inequitable to share good will. Where confusion is avoided there is no unfair competition.

“There is no evidence of passing off or deception on the part of the Kellogg Company; and it has taken every reasonable precaution to prevent confusion or the practice of deception in the sale of its product.”

Kellogg Co. v. National Biscuit Co., 305 U. S. 111, 83 L. Ed. 73, 80.

The above is a reiteration of what has long been the law.

“The only real controversy presented by the evidence is whether or not the defendants have been guilty of unfair competition, by attempting to palm off on the purchasers of silverware, as of the manufacture of complainant, that which in fact was of a different manufacture.”

Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co., 92 Fed. 774, 775.

“‘A court of equity will not interfere, when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other.’ By the court in *McLean v. Fleming*, 96 U. S. 245, 255, 24 L. Ed. 828.”

Caign v. Plibrico Jointless Firebrick Co., 65 F. 2d 849, 851 (C. C. A. 1).

“Defendant’s activities have been confined to a field entirely isolated from that occupied by plaintiff. Being in two entirely different fields of activity there can be no confusion of source of origin.”

Philco Corporation v. F. & B. Mfg. Co., *supra*, citing from page 962.

The principles of trademark infringement and unfair competition herein set forth and supported by authority are in conformance with the law of unfair competition as it is interpreted by the California courts and reflected in the Federal court decisions in this circuit.

The California cases where unfair competition was held to apply can all be distinguished. In *Modesto Creamery v. Stanislaus Creamery*, 168 Cal. 289, the word "Modesto" was used on the identical goods in each case.

In *Sunmaid Raisin v. Mosesian*, 84 Cal. App. 485, both products were raisins and the marks were similar.

In *Wood v. Peffer*, 55 Cal. App. 2d 115, the goods were both refrigerators and the marks the same.

In *Winfield v. Charles*, 77 Cal. App. 2d 64, there was a deliberate overt act of unfair competition. Actual confusion was flagrant and repeated.

In *Brooks Bros. v. Brooks Clothing of California*, 60 Fed. Supp. 442, the goods were identical, namely, men's clothing.

In *Lane Bryant, Inc. v. Maternity Lane Limited of California*, 173 F. 2d 559, the goods were identical and the marks similar.

In *Stork Restaurant v. Sahati*, 166 F. 2d 348, the marks were fanciful and the case hinged on that. The same rule applied in *Safeway Stores v. Dunnell*, 172 F. 2d 649.

It is clear therefore that in accordance with the authorities followed by this circuit the facts in evidence do not show either that there is trademark infringement or that there is unfair competition.

The Argument Condensed.

From all of the foregoing facts it appears that the Plaintiff has an established trademark for use on electrical appliances. The Defendant is entitled to its own good will which it has established as a wholesaler of furniture of which lamps are part and parcel.

Plaintiff has seized upon the fact that there is a socket, cord and plug for electricity in a lamp and has based its entire case on that point. It has used that insignificant and immaterial circumstance to bring privation upon this Defendant forcing him to a burdensome defense of his good will in a business totally unrelated to Plaintiff's electrical business. No trademark infringement has been shown. No unfair competition has been pointed to. No likelihood of confusion is at all apparent. The prevailing authorities are in full accord with these contentions.

POINT 8. The Trial Court's Findings Have No Basis in Fact, and Its Conclusions Are Erroneous.

The portions of the evidence which are material to this issue have been discussed at length. They point clearly to errors of the trial court already enumerated in this brief. That those errors are fatal and beyond dispute is clearly evidenced when the record is examined in the light of the prevailing law. Since the conclusions of law are based upon findings which are in error, and since the conclusions failed to take into consideration findings which were omitted, the conclusions are groundless and the judgment wrongs the Defendant. This wrong should be rectified by the court of appellate jurisdiction.

POINT 9. The Judgment Exceeds the Proof and Is in Error.

Plaintiff in its prayer for relief seeks an injunction against the use of the word SUNBEAM as a brand name or trademark for electrical goods. It also seeks an injunction against the doing of any acts calculated to induce the belief that the Defendant is in any way connected with the Plaintiff.

Plaintiff has not established its trademark broadly on electrical goods. Plaintiff has established its trademark only on electrical appliances. Decorative lamps are not appliances. Defendant's only electrical items are decorative lamps. Therefore Defendant should not be enjoined from using its own name or the mark SUNBEAM as a tradename or trademark in any guise whatever on decorative lamps nor upon furniture.

Nowhere in the evidence is there any instance of Defendant doing any act to induce anyone that Defendant is connected with Plaintiff or its products. The injunction in this respect therefore is superfluous. It is, on the other hand, misleading and implies that what Defendant has been doing in the past is enjoinable. This is error and should be reversed.

Conclusion.

As has been pointed out specifically herein the proof does not support the judgment of the trial court. Interpretation by the trial judge of the proven facts in the light of the prevailing law in this circuit is in error. The judgment should therefore be reversed in its entirety and the complaint dismissed with costs to the Defendant.

Respectfully submitted,

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